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Oliver Wendell Holmes Jr. and the Darwinian Common Law Paradigm

Allen Mendenhall

1 Among the operative paradigms for the common law within the American constitutional framework, two take prominence: one that treats the common law as a settled and complete canon of rules unchanged over time, and the other that treats the common law as a process for deciphering malleable and adaptive rules.[1] The former is evoked whenever a judge or justice declares, "At common law, the rule was such and such,"[2] as if the rule had never been anything else and was not still within the common law tradition, albeit in attenuated form and subject to constitutional restrictions. Although these paradigms of the common law track similar, related debates about whether the United States Constitution should be interpreted as a "living" document or according to its original meaning,[3] they involve a different subject and inquiry: the role of the judge or justice with regard to case precedent derived from custom and practice and the assimilation of cultural norms and standards into the body of rules that govern society. A constitution fixes the parameters within which a judge or justice may interpret rules and precedents, but the methodology of following or revising precedent is still settled by common law traditions and hermeneutics to a great extent, even in the United States.[4]

2 The paradigm of a static common law results from the messy incorporation of the British common law into the legal system of the former colonies during the early years of the American Republic.[5] The common law was never permanently stable, unified, or complete; however, it did include a definite and operational set of rules in Britain when the colonies sought to implement it in their legal training and methods.[6] The two paradigms for the common law seem like an irresolvable dichotomy, but they are permeable: in theory, both necessarily exclude the other, but in practice the separation is not total and the difference not obvious.

3 Throughout his legal writing and in his book *The Common Law,* Holmes presented the common law as evolutionary rather than static.[7] In the third paragraph of *The Common Law* he cautioned against the error of "supposing, because an idea seems familiar and

natural to us, that it has always been so" (Holmes 1881: 1). His notion of the common law was rooted in "historicism and Darwinian natural selection" (Alschuler 2000: 87). Holmes admired Sir Frederick Pollock, his British pen pal and a popular jurist, and Pollock admired Darwin and modeled his jurisprudence on evolutionary theory. Pollock once stated in a letter to Holmes that "I have been turning over the life of a much greater man, C. Darwin. His letters are about the most fair-minded and charitable a much attached man ever wrote" ("Letter to Holmes from Sir Frederick Pollock," November 14, 1923). Harold Laski seemed to be reading Darwin regularly and dashing off missives to Holmes that praised Darwin as a great, brilliant, and gentle man. Frederic R. Kellogg (Kellogg 2007) picks up on Holmes's Darwin connection and calls attention to the pragmatic qualities of Holmes's evolutionary common-law theories. Kellogg suggests that the common law was the instantiation of Holmes's Darwinian pragmatism.

4 The term *pragmatism* was not in wide circulation during the early years of Holmes's long career. Holmes did not declare himself a pragmatist. Nevertheless, the term *pragmatism* gained purchase because of such pragmatist thinkers as C. S. Peirce, William James, John Dewey, Chauncey Wright, Jane Addams, George Santayana, and George Herbert Mead. Writers on Holmes have assigned the term *pragmatist* to Holmes's common law methodology that tropes Darwin. This essay explains why this is fitting and examines the pragmatic aspects of Holmes's only book, *The Common Law*. I limit my discussion of *The Common Law* to those "lucid and marvelous periods by which Holmes' inner struggle is transformed into insights about the law," because the other sections of *The Common Law* consist of "the usual dust of the law that we all know" (Touster 1981-2: 684). I then propose something novel: that Emerson's influence on Holmes contributed to Holmes's evolutionary conception of the common law and that Holmes, more than any other pragmatist, substantiates the claim that Emerson was a pragmatist, proto-pragmatist, or at least a philosopher who espoused theories that represent pragmatism in embryonic form. I end my discussion with an invitation to consider how Holmes's fascination with Emerson plays into Darwinian common-law theory and lends support for the controversial notion that Emerson inaugurated the pragmatist tradition.

5 The analytical, positivist, or legal realist schools of jurisprudence as exemplified and examined by H. L. A. Hart and his progeny have opened up new ways of looking at Holmes but are at odds with, or uninterested in, the tradition of pragmatist scholarship on which I focus (i.e., the tradition that can be traced back to Kenneth Burke through Russell B. Goodman, Giles Gunn, Richard Poirier, Cornel West, Joan Richardson, Jonathan Levin, and Louis Menand). Over the years I have found research on Hart and Holmes useful and interesting, including works by Stephen R. Perry and Anthony D'Amato, but this scholarship tends to concentrate on the jurisprudence that came after Holmes (i.e., on spin-offs and seemingly endless interpretations of the "bad man theory") and not on the pragmatism that came before Holmes or that arose alongside Holmes (e.g., the pragmatism of Emerson, Peirce, James, and Dewey). The recalcitrant concentration on legal realism, the separation of law and morals, the nature of the law, and the is/ought distinction have led legal scholars into redundancy and insularity and away from pragmatism's rich and always relevant inquiries into deliberative democracy, pluralism, metaphysical realism, anti-authoritarianism, aesthetic experience, pluralism, and instrumentalism. The best starting point for understanding Holmes is not legal realism and the like but rather those figures like Emerson and William James who actually corresponded with Holmes, advised Holmes, and served as Holmes's sounding-boards.

Counterintuitively, returning to pragmatism's classical roots can revivify the enterprise of Holmes scholarship by shifting emphasis to the aesthetic features of language, poetry, representation, and culture, which interested the young Holmes, who still considered himself to be primarily a poet and an artist and not a lawyer or jurist. It is true that, after the Civil War, during his studies at Harvard Law School and shortly thereafter, Holmes read Bentham and Austin and seemed to have read every major legal mind in the Anglo-American legal tradition, and also that the influence of these jurisprudents played into his pragmatism, especially into his "bad man theory," but I believe, with regard to Holmes's influences, these jurisprudents are secondary to Emerson and the classical pragmatists. Among legal scholars there is an understandable inclination to view Holmes through the prism of the jurisprudential writing that came after him while disregarding the teachings of the non-legal pragmatist thinkers who came before him or who were his contemporaries during his formative years. A more fruitful and interesting retrospective approach to Holmes, however, would account for his pragmatic aesthetics because Holmes demonstrates that the operational and functional role of artistic signs and forms shapes the law and legal institutions to varying degrees.

Holmes and Pragmatism

6 Kellogg has argued that Holmes's paradigm for the common law not only "draws heavily from the historical debate between English legal theorists over the nature and source of legal rationality" but also "finds remarkable parallels to certain ideas of Holmes's nonlawyer friends, Chauncey Wright, Charles S. Peirce, William James, and others, among whom were founders of the American school of philosophical thought known as pragmatism, growing out of the multifaceted influence of the Scottish Enlightenment on American thought and the response of Cambridge intellectuals to Darwin's *Origins of Species*" (Kellogg 2007: 14). Kellogg is not alone in spotting the connection between Holmes, pragmatism, Darwin, and the common law. In 1943 Paul L. Gregg described Holmes's pragmatism as seeking out truth through hypothesis, experiment, and community consensus. Gregg called attention to Holmes's "delightful literary style" (Gregg 1942-3: 263) and placed Holmes in the tradition of Peirce and James insofar as Holmes "refers to majority vote as the test of truth" (Gregg 1942-3: 267). Holmes's pragmatism underwent pointed reproach in the 1940s and was even accused of sharing the positivist themes and goals of Nazism.[8] Such tendentious exaggerations were not widespread and were counterbalanced by more reasonable and levelheaded assessments just a few years later.[9] Attention to Holmes's pragmatism fell away as general attention to pragmatism fell away during the 1950s, 60s, and 70s. With the explosion of studies on pragmatism in the 1980s and 1990s, scholarship on Holmes began to reconsider his relationship to pragmatism and the pragmatists. "[W]hile there are indeed multiple and apparently clashing strands in Holmes's thought," Thomas C. Grey observed at this time, "most of them weave together reasonably well when seen as the jurisprudential development of certain central tenets of American pragmatism" (Grey 1989: 788). Likewise, Richard Posner pointed out that "Holmes was a friend of Peirce, James, and other early pragmatists, and his philosophical outlook is strongly pragmatic" (Posner 2003: 57).

7 In 1990, *Southern California Law Review* held a symposium entitled "The Renaissance of Pragmatism in American Legal Thought." Holmes was the catalyst for this renaissance.

Six years later a conference on Holmes and pragmatism took place at Brooklyn Law School to commemorate the 100th anniversary of "The Path of the Law." Posner was the keynote speaker. Other speakers included Grey, Catharine Pierce Wells, G. Edward White, and Gary Minda. A flurry of articles on Holmes and legal pragmatism pursued the arguments put forth at the conference.[10] The sudden attention to Holmes led legal scholars to contemplate the relationship between pragmatism and the American legal system. Richard Rorty, seemingly dismissive of the growing interest in pragmatism among legal academics, declared, "I think it is true that by now pragmatism is banal in its application to law" (Rorty 1989-90: 1811).

8 Others disagreed, including Louis Menand, who recognized an Emersonian streak in Holmes's pragmatism. Perhaps more than any other book, Menand's Pulitzer Prize winning *The Metaphysical Club* generated attention to Holmes's pragmatism as a response to the trauma and suffering of the Civil War and to the burgeoning ideas of Darwinian evolution. Menand also attended to the ways in which Holmes's boyhood "enthusiasm for Emerson never faded" and explained how Holmes's "posture of intellectual isolation" was "essentially Emersonian" (Menand 2001: 68). Menand thereby complicated the already ramified literature regarding Emerson's alleged status as a forerunner to pragmatism. Scholars as wide-ranging as Burke,[11] Goodman, Gunn, Poirier, West, Richardson, and Levin have weighed in on the pragmatic elements of Emerson's thought. Each of these scholars missed or failed to account for the manner in which Emerson's pragmatism bore out in Holmes's judicial writings.

9 Holmes's pragmatism is now established. Susan Haack has announced that "both legal scholars and historians of philosophy acknowledge Holmes as the first legal pragmatist; and with good reason, for many themes familiar from the philosophers of the classical pragmatist tradition can also be found in Holmes's legal thinking" (Haack 2011: 67-8). Haack goes on to sketch the most important links between Holmes and the classical pragmatists; rather than rehashing this sketch, I assume my readers are familiar with it and will touch upon only those areas concerning Holmes's common law theories and pragmatism. Given that Holmes's debt to pragmatism is no longer disputed, it is remarkable that the still-disputed pragmatism of Emerson has not been evaluated in terms of Holmes, especially in light of the fact that Holmes himself, in a letter to Emerson, articulated the "mark of gratitude and respect I feel for you who more than anyone else first started the philosophical ferment in my mind" (Novick 1989: 149). Legend has it that Holmes, at age fourteen, informed Emerson that "[i]f I ever do anything, I shall owe a great deal to you" (Baker 1991: 85; Menand 2001: 25). Holmes is rumored to have sought out Emerson's autograph in 1862 (Baker 1991: 125), and on his seventeenth birthday his parents presented him with two volumes of Emerson's essays (Menand 2001: 22). What elements of Emerson's thought might have guided Holmes's approach to the common law? How might Emerson's drive to renew past paradigms parallel the judge's handling of settled case precedents in matters of immediate urgency?

Holmes's Common Law

10 To avoid getting tangled in the "desperately confusing scholarly mare's nest" resulting from "a divergence of the legal meaning(s) of a word [*pragmatism*] from its philosophical meanings" (Haack 2005: 74), Holmes should be considered alongside the classical pragmatists and not alongside the neopragmatists[12] because the latter tradition sullied

and distorted pragmatism, at least according to Haack.[13] Regardless of whether Haack is correct, the conceivable parameters of pragmatism would have been different before the mid-20th century trends and advances in analytical or language-based philosophies gained traction in legal theory. Holmes intended the lectures that made up *The Common Law* "to take up from time to time the cardinal principles and conceptions of the law and make a new and more fundamental analysis of them [...] [f]or the purpose of constructing a new Jurisprudence or New First Book of the law" (Gordon 1992: 2). Viewing Holmes through the lens of neopragmatism can cause one to forget there was a time when Holmes's theories were considered novel and when it would have been unthinkable for someone to declare that "everybody seems to now be a legal realist. Nobody wants to talk about a 'science of law' any longer. Nobody doubts that what Morton White called 'the revolt against formalism' was a real advance, both in legal theory and in American intellectual life generally." (Rorty 1989-90: 1811).

11 Kellogg is an excellent starting point for approaching Holmes's theories of the common law because he avoids the anachronistic application of neopragmatist ideas in his study of Holmes and situates Holmes's common-law theories alongside canonical thinkers on the subject: Sir Edward Coke, Thomas Hobbes, Sir Matthew Hale, and Sir William Blackstone. These figures were by no measure uniform in their understanding of the common law; their ideas diverged widely and continue to demonstrate how common law theory is never settled. Precisely because it is never settled, the common law is ripe for theoretical appropriation. Holmes was able to put his own mark on it in the late nineteenth and early twentieth centuries. "It would seem," says Kellogg, "that nothing quite like the intellectual background of Darwinian evolution and [Chauncey] Wright-influenced fallibilism could be found in previous theoretical writings about the common law, and it is evident that Holmes himself believed his theory to be original" (Kellogg 2007: 47). Darwin's *Origins of Species* did not appear until 1859, just 21 years before the publication of *The Common Law,* and Chauncey Wright was Holmes's friend and contemporary. Holmes himself admitted that as a young man he had absorbed Darwinism without having read much of it: "*The Origin of Species* I think came out while I was in college – H. Spencer had announced his intention to put the universe into our pockets – I hadn't read either of them to be sure, but as I say it was in the air" (Holmes to Morris Cohen, in *The Essential Holmes* 1992: 110). When Holmes died, a marked-up copy of Darwin's *The Origin of Species* was found among his books (Baker 1991: 84).

12 It has been said that "it is quite impossible to understand and appreciate the judicial method of Justice Holmes without taking into account the fact that he was steeped in the tradition of the common law" (Wu 1960-1: 222). Holmes's career spanned some of the most transitional eras of American history; widely accepted notions of the common law changed during various periods of his life. Many of those changes are attributable to him. [14] He pushed American jurisprudence away from the Blackstonian conception of the common law that had appealed to the founding generation[15] and that had been dealt a heavy blow by the Civil War and Reconstruction.[16]

13 Kellogg summarizes Blackstone's conception of the common law as a fixed entity that is universal, continuous, valid because of its long standing, and customary (Kellogg 2007: 48-9). Like Coke and Hale, Blackstone envisioned the common law as the institutional perfection of human reason that was separate from codified legislation (Kellogg 2007: 48-9).[17] As against statutory commands, Blackstone referred to the common law as unwritten law (Blackstone 1996: 63) or "the monuments and evidences of our legal

customs [as] contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treaties of learned sages of the profession, preserved and handed down to us from the times of highest antiquity" (Blackstone 1996: 62-3). He acknowledged that the common law was rooted in binding oral traditions and submitted that "[o]ur ancient lawyers [...] insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated" (Blackstone 1996: 64). Whether these appeals to antiquity and claims of unbroken lineage were intended to validate judicial power or engender national pride is a matter of scholarly debate that exceeds the scope of this essay.[18] Suffice it to say that with some exceptions Blackstone portrayed the common law as a static canon dating from time immemorial and that his notions of natural law attracted religious traditionalists as well as Enlightenment intellectuals who extolled the powers of human reason that purportedly discriminated between competing ideas to discern the true laws that governed the universe.[19]

14 Blackstone's insistence upon the "unchanged" and "unadulterated" aspect of the common law is inapposite to Holmes's conception of the common law as a spontaneously ordered system of growth. Blackstone viewed the common law as divorced from legislation (Kellogg 2007: 54-5), as a "judicial prerogative" set against "a transformative tide toward majoritarian legislation and central government" (Kellogg 2007: 55), and as a "defense of embedded, and not entirely well reasoned or intentioned, practices" (Kellogg 2007: 55). Holmes more than Blackstone took into account the manifold rules and regulations that were not judicially made: the countless acts of the state and federal legislatures (Kellogg 2007: 56). Also more than Blackstone, Holmes accounted for the role of the sovereign, through its legislature, to confer rights and duties upon its citizens. In Blackstone's paradigm, the sovereign was the king, who shared his power with the legislature or Parliament, but in Holmes's it was an executive and legislative branch in a maturing American Republic or democracy.

15 For Holmes the judge did not divine pure law or right reason by consulting the wisdom of the ages as embodied in enduring case precedent but considered "intractable legal disputes [as] bearing a certain degree of unforeseen novelty or originality" while treating the "legal profession, in concert with the community at large, [as] work[ing] out a gradual resolution through progressive abstraction from specific cases" (Kellogg 2007: 56). As Holmes put it, "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past." (Holmes 1881: 1). This observation about the law is in keeping with Emerson's imperative to "let the breath of new life be breathed by you through the forms already existing" (Emerson 1883: 147). Emerson, like Holmes, rejected "[a]ll attempts to project and establish a Cultus with new rites and forms" (Emerson 1883: 147) and instead encouraged individuals to "employ the symbols in use in his day and nation" because "the new [...] is always formed out of the old" (Emerson 1996: 431). Emerson invoked the spirit of common-law adjudication in "The American Scholar" when he discussed books as past authorities that facilitated future inspiration and advancement as though books themselves were precedential laws that bound artists even as they liberated those same artists into creative freedom (Emerson 1996: 56-9). Following Emerson, Holmes projected onto the common law a vision of history and influence in which present forms and

conditions were revisions and extensions of past forms and conditions. Holmes envisioned common-law judges to be inventors like Emerson's artists with the important proviso that "the inventor only knows how to borrow" (Emerson 1996: 634).

16 Although Holmes went beyond Blackstone in acknowledging the plain historical fact that codification was on the rise and increasingly displacing the common law tradition, he remained enamored with the common law. The irony of *The Common Law* is that it describes a "theory of the judiciary alone, limited to the special conditions of the common law development during a period before legislation became the dominant mode of lawmaking" (Touster 1981-2: 693). Holmes's tome about judicial and precedential law appeared at a time when "legislation had become the acknowledged and central means by which the state pursued social ends" (Touster 1981-2: 693). Holmes's awareness of this tendency toward immense legislative classifications, more obvious and severe in his day than in Blackstone's, had to do with his unique understanding of the positivism of Thomas Hobbes and John Austin, whose theories he had challenged and rejected (Kellogg 2007: 58). *The Common Law* might have mimicked Sir Henry Maine's *Ancient Law* in organization and framework as well as in its subtle and mostly implied recognition that law had been graduating from the supposedly inherent reason of the common law system to the rigid logic of positivism.[20] "Maine proposed [...] that law, in its formal aspects, moves from a period of legal fictions to one of equity or case-law to one of legislation," and Holmes "seems to have been determined to do a comparable work of historical analysis for the common law and even went so far as to structure his book chapter by chapter on the model of Maine's work" (Touster 1981-2: 684).

17 Unlike Maine, Holmes sought to incorporate the latest science into his jurisprudence, "apparently go[ing] further than Maine by using the new biological and anthropological materials on evolution that the Darwinian revolution in thought was providing" (Touster 1981-2: 684). Holmes's apparent Darwinism dovetailed with pragmatism. His jurisprudence has been called "evolutionary pragmatism" (Gordon 1981-2: 721). "According to this idea," explains one scholar, "no legal form has a frozen meaning; rather, legal forms are changing and contingent and depend on the specific practical uses to which successive generations wish to put them. The form may stay the same, but the content changes with changing views of policy – the policy upon which all law must ultimately be grounded." (Gordon 1981-2: 721). The primary difference between Blackstone and Holmes is that the former embraces a common-law paradigm consisting of fixed rules rooted in ancient custom whereas the latter embraces a common-law paradigm consisting of fluid rules responsive to changing social conditions. Holmes's common-law paradigm reveals his indebtedness to Emerson, who availed himself of pragmatic superfluities of language to ensure the continuity and freshness of old ideas in new contexts. The term *superfluity* signifies the creative urge to overcome, outdo, move beyond, facilitate, generate, push forward, transcend, outlast, or surpass. Like genius according to Emerson, superfluity "looks forward" and "creates" (Emerson 1996: 58). Superfluous language "smites and arouses" with its "tones," "breaks up" our "whole chain of habits," and "opens" our eyes to our own "possibilities" (Emerson 1983: 409). It is characterized by an extravagance of style that consists of sound, metaphor, rhythm, and complexity. Poirier suggests that Emersonian superfluity counteracts repose in writing and ideas and involves "a kind of rapid or wayward movement of voice" that "is associated [...] with speed" and a "momentum or volatility of style" (Poirier 1992: 45). Superfluity is about "generative interaction" (Poirier 1992: 47), "a struggle with

language" (Poirier 1992: 50) or the "continuous struggle with language" (Poirier 1992: 67), "creative energy" (Poirier 1992: 50), a "commitment" to "more than is necessary [for the] survival" of ideas and influences (Poirier 1992: 55), "accelerations of a process" (Poirier 1992: 55), the "power of invention" (Poirier 1992: 57), an "overwhelming excess of productivity" (Poirier 1992: 58), "words in excess of the minimum daily requirements of human beings" (Poirier 1992: 58), the "plenitude and power of language" that propels one's "voice into the future" (Poirier 1992: 60), "the power for new creation" (Poirier 1992: 71), "generative" and "creative power" (Poirier 1992: 73), "engendering" (Poirier 1992: 74), and "speaking to a posterity in no way bound by th[e] discourse" in which people in their specific time and place are immersed. All of these notions are emphatically against "a loss of creative powers" (Poirier 1992: 47), "immobility" (Poirier 1992: 59), "stand still" (Poirier 1992: 58), "the stasis achieved by former movements that have become textualized or intellectualized" (Porier 1992: 65), and "bareness" (Poirier 1992: 70-1). Emersonian superfluity finds expression in Holmes's sparkling judicial writing that calls attention to itself and thereby ensures that his rules and reasoning attract future audiences and reach beyond their present moment.

The Common Law and Pragmatism

18 Haack lists the following features of Holmes's jurisprudence that are compatible with traditional common law theory that flies in the face of legal positivism and underplays the role of legislatures in transmitting laws to the public: the prediction theory of law (Haack 2011: 68); the growth and adaptation of legal concepts (Haack 2011: 69); the evolution of legal systems (Haack 2011: 70); the past and the future of the law (Haack 2011: 71); the relevance of the sciences, and especially the social sciences, to the law (Haack 2011: 71); and moral fallibilism (Haack 2011: 72). Each of these features of Holmes's pragmatism participates with one another; none exists to the exclusion of the others. Holmes's dogged insistence that law and morality were separate or only incidentally aligned, for instance, brought about his reasonable man theory of negligence that turned on the foreseeable consequences of a given human action. This theory captures his signature concept of law as prediction,[21] grows out of his prior theories of negligence,[22] and incorporates moral fallibilism insofar as it proposes that a tortfeasor is not judged according to his particular state of mind but according to an objective standard about how reasonable people in general ought to behave in light of their circumstances.[23]

19 *The Common Law,* which is only a brief introduction to Holmes's jurisprudence, touches upon each of the features mentioned by Haack. Here is Holmes on the prediction theory of law:

> The degree of apprehension may affect the decision, as well as the degree of probability that the crime will be accomplished. (Holmes 1881: 46)
>
> There must be an intent to deprive such owner of his ownership therein, it is said. But why? Is it because the law is more anxious not to put a man in prison for stealing unless he is actually wicked, than it is not to hang him for killing another? That can hardly be. The true answer is, that the intent is an index to the external event which probably would have happened, and that, if the law is to punish at all, it must, in this case, go on probabilities, not on accomplished facts. (Holmes 1881: 48)
>
> The only guide for the future to be drawn from a decision against a defendant in an action of tort is that similar acts, under circumstances which cannot be distinguished except by the result from those of the defendant, are done at the peril

> of the actor; that if he escapes liability, it is simply because by good fortune no harm comes of his conduct in the particular event. (Holmes 1881: 54)

20 Here is Holmes on the growth and adaptation of legal concepts and the evolution of legal systems:

> The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. (Holmes 1881: 1)
>
> The customs, beliefs, or needs of a primitive time establish a rule or formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains. The reason which gave rise to the rule has been forgotten, and ingenious minds set themselves to inquire how it is to be accounted for. Some ground of policy is thought of, which seems to explain it and to reconcile it with the present state of things; and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career. The old form receives new content, and in time even the form modifies itself to fit the meaning which it has received. (Holmes 1881: 3-4)
>
> The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow. (Holmes 1881: 25)
>
> However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. (Holmes 1881: 25)
>
> If truth were not often suggested by error, if old impediments could not be adjusted to new uses, human progress would be slow. But scrutiny and revision are justified. (Holmes 1881: 25)

21 Here is Holmes on the past and the future of the law:

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. (Holmes 1881: 1)
>
> The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past. (Holmes 1881: 1)
>
> The reader may begin to ask for the proof that all this has any bearing on our law of today. So far as concerns the influence of the Roman law upon our own, especially the Roman law of master and servant, the evidence of it is to be found in every book which has been written for the last five hundred years. (Holmes 1881: 12)
>
> When ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and [...] they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted. (Holmes 1881: 24)
>
> To understand [laws'] scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is. (Holmes 1881: 25)

22 It is difficult to find in *The Common Law* precise examples of how Holmes incorporates the sciences, and especially the social sciences, into the law, because the book is itself an exercise in social science that tropes Darwin while mentioning relevant scholarship in the appropriate places. Here, however, is one example:

> There are crimes which do not excite [revenge], and we should naturally expect that the most important purposes of punishment would be coextensive with the whole field of its application. It remains to be discovered whether such a general purpose exists, and if so what it is. Different theories still divide opinion upon the subject. (Holmes 1881: 29)

23 Forays into science appear more elaborately in Holmes's opinions as a United States Supreme Court justice. In *Darling v. City of Newport,* for example, he stated with seeming authority that the "ocean hitherto has been treated as open to the discharge of sewage from the cities upon its shores. Whatever science may accomplish in the future we are not aware that it yet has discovered any generally accepted way of avoiding the practical necessity of so using the great natural purifying basin." (*Darling v. City of Newport* 1919: 542-3). Thirteen years earlier he had carefully examined scientific studies about bridges, water, typhoid, and navigation to prepare for his opinion in *State of Missouri v. State of Illinois,* in which he wrote that "the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence in it is to be approached" (*State of Missouri v. State of Illinois* 1906: 268). He then undertook an exacting analysis, dividing the plaintiff's and the defendant's experts into opposing factions:

> We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, everything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted. [...] The distance in which the sewage has to travel (357 miles) is not open to debate, but the time of transit, to be inferred from experiments with floats, is estimated as varying from eight to eighteen and a half days, with forty-eight hours more from intake to distribution, and when corrected by observations of bacteria is greatly prolonged by the defendants. The experiments of the defendant's experts lead them to the opinion that a typhoid bacillus could not survive the journey, while those on the other side maintain that it might live and keep its power for twenty-five days or more, and arrive at St. Louis. Upon the question at issue, whether the new discharge from Chicago hurts St. Louis, there is a categorical contradiction between the experts on the two sides. (*State of Missouri v. State of Illinois* 1906: 523)

24 Holmes went on to discuss the quantity of bacteria and typhoid bacillus in the river water, the speed of the river current in relation to the distance that germs could travel downstream, and the degree of danger of the bacteria within quick-moving currents compared to bacteria in stagnant water.

25 In *Steward v. American Lava Co.* Holmes evaluated a patent for acetylene gas burners as well as their processes for burning gas. He described acetylene gas as follows:

> It is very rich in carbon, and therefore has great illuminating power, but, for the same reason, coupled with the relatively low heat at which it dissociates and sets carbon free, it deposited soot or unconsumed carbon, and soon clogged the burners then in use. It was possible to secure a complete consumption of carbon by means of the wellknown Bunsen burner. This consists of a tube or cylinder pierced on the sides with holes for the admission of the air, into one end of which a fine stream of gas is projected through a minute aperture, and from the other end of which it escapes and then is burned. A high pressure is necessary for the gas in order to

> prevent its burning back. The ordinary use of the Bunsen burner is to develop heat, and to that end a complete combustion, of course, as desired. But, with an immediately complete combustion, there is little light. The yellow light of candles and gas jets is due to free particles of carbon at a red heat, but not yet combined with oxygen, or, as we commonly say, consumed. On the appearance of acetylene gas, inventors at once sought to apply the principle of the Bunsen burner with such modifications as would produce this result. In doing so, they found it best to use duplex burners, – that is burners the outlets of which were inclined toward each other so that the meeting of the two streams of gas formed a flat flame, and to let in less air. (*Steward v. American Lava Co.* 1909: 162)

26 He then stated, "We should regret to be compelled to decide a case by the acceptance or rejection of a theoretic explanation upon which it still is possible that authorities in science disagree" (*Steward v. American Lava Co.* 1909: 166). These three cases strengthen Haack's claim that science and social science were features of Holmes's jurisprudence. Finally, here is Holmes, in *The Common Law,* discussing moral fallibilism:

> If punishment stood on the moral grounds which are proposed for it, the first thing to be considered would be those limitations in the capacity for choosing rightly which arise from abnormal instincts, want of education, lack of intelligence, and all the other defects which are most marked in criminal classes. I do not say that they should not be, or at least I do not need to for my argument. I do not say that the criminal law does more good than harm. I only say that it is not enacted or administered on that theory. (Holmes 1881: 31)
>
> The law of torts abounds in moral phraseology. It has much to say of wrongs, of malice, fraud, intent, and negligence. Hence it may naturally be supposed that the risk of a man's conduct is thrown upon him as the result of some moral short-coming. But while this notion has been entertained, the extreme opposite will be found to have been a far more popular opinion; – I mean the notion that a man is answerable for all the consequences of his acts, or, in other words, that he acts at his peril always, and wholly irrespective of the state of his consciousness upon the matter. (Holmes 1881: 54-5)
>
> [A]lthough the law starts from the distinctions and uses the language of morality, it necessarily ends in external standards not dependent on the actual consciousness of the individual. So it has happened with fraud. If a man makes a representation, knowing facts which by the average standard of the community are sufficient to give him warning that it is probably untrue, and it is untrue, he is guilty of fraud in theory of law whether he believes his statement or not. (Holmes 1881: 217-8)

27 These are mere samplings. Much of *The Common Law* substantiates Haack's point that Holmes entertained and employed pragmatic theories that represented the evolutionary theories animating the common law. Kellogg suggests that insofar as Holmes's conception of the law offers a model of an "ongoing community exploring common problems," it bears "remarkable similarities to the model of scientific inquiry emerging at roughly the same historical period in the writings of Holmes's controversial friend Charles S. Peirce, a model later adopted by John Dewey" (Kellogg 2007: 34). The class poet at Harvard, the son of the famous poet and man of letters, and a *protégé* of Emerson, Holmes marries the analytical tradition of pragmatism and the aesthetic tradition of pragmatism explored in the works of Burke, Goodman, Gunn, Poirier, West, Richardson, and Levin.

28 Holmes's "underlying conception of society" reflects his "exposure to the struggle of Darwinian evolution" (Kellogg 2007: 94). This conception was "much discussed in the Metaphysical Club and confirmed in some respects by the American Civil War, both of which reinforced doubts concerning the prospects for [the] law-based liberal or utilitarian reform" (Kellogg 2007: 94). Kellogg purports that Holmes "looked backward to

common law as the archetypal decentralized model, modified in the spirit of public inquiry, parallel to the Peircean model of scientific inquiry and problem solving, balanced with a comprehensibility and predictability derived from the spread of external standards" (Kellogg 2007: 95). To this end, Holmes viewed the judge's role as receptive to existing cultures at local levels and considered order itself to be "decentralized, supple, [...] unfinished, [and] constantly under construction and revision" (Kellogg 2007: 95). He was unlikely to deem as unconstitutional any enacted legislation and in fact did so only once during his twenty-year career (1882-1902) on the Massachusetts Supreme Judicial Court. He disapproved of legislation only if it abridged freedom of speech, and he grew committed to the notion that a marketplace of ideas was necessary for the best theories to outdo competitors and prove their practical worth. Holmes's jurisprudence commemorates judges as cultural interpreters subject to "community-approved standards and precedents [that] derive from ancient rules" (Kellogg 2007: 122). He believed that judges ought not to "*set* the policy so much as be aware of it," although they "could and should update the reasoning" about how to apply old concepts in the current environment (Kellogg 2007: 122).

29 What sets Holmes apart from other classical pragmatists is not just his station as a Supreme Court justice but his commitment to Emersonian thought and aesthetics. Emerson "put the living generation into masquerade" out of the "faded wardrobe" of the past (Emerson 1983: 547) just as Holmes discussed the "form of continuity" that is "nothing but the evening dress which the new-comer puts on to make itself presentable according to conventional requirements" (Holmes 1880: 234). Holmes never forgot Emerson. He published *The Common Law* in 1881. In 1882, Emerson died. The year between 1881 and 1882 represents the passing of a baton as Holmes preserved Emerson's ideas and aesthetics but stripped them of the characteristics and qualities that were no longer suited for the postwar era.[24] Holmes was an Emersonian and a pragmatist, and if there were a model for how those two traditions coincide it is in Holmes's famous judicial dissents that mobilize the common law system within the constitutional framework by undermining current case precedents while anticipating and establishing future case precedents.

30 Much ink has been spilled over the vexed issue of Emerson's putative pragmatism. It should go without saying that Emerson's status as a pragmatist has been challenged repeatedly and most memorably in Stanley Cavell's essay "What's the Use in Calling Emerson a Pragmatist?" It is not worth defending or refuting Emerson's alleged standing as a pragmatic thinker here because, at this point, the "notion that Emerson is a seminal figure or precursor for American pragmatism is no longer new or controversial" (Albrecht 2012: 18). Cavell's question has yielded various arguments, but scholars have yet to formulate a response in terms of Holmes, who was not only a member of the Metaphysical Club but also a *protégé* of Emerson. Haack's work on Holmes and the common law provides an opportunity for those working in and advocating an Emersonian pragmatic tradition to outflank their antagonists by tapping into both the aesthetic and classical pragmatist traditions in the person of Holmes. It might be that Emersonian superfluity bears out in Holmes's judicial opinions and dissents, which themselves form and respond to a canon of case precedents. In the context of common-law judging Holmes unites with the analytical tradition of pragmatism Emerson's emphasis on "life, transition, and the emerging spirit" as the driving forces behind the evolution of arts and culture (Emerson 1983: 413). By dissenting with lively language and an emerging spirit

Holmes guaranteed the "generative, agonistic interplay between power and limitation" that propels the common-law system forward, preserving what precedents remain constructive and shaking off those holdings which are no longer fitful in the changed environment (Albrecht 2012: 62). "Emerson value[d] processes but not necessarily their end products," Poirier said, "which are in any event only instruments of further processes" (Poirier 1992: 2). Holmes saw in the common law the instantiation of these pragmatic processes that Emerson valued. Until scholars of pragmatism fully account for Holmes's Emersonian role in the pragmatic tradition, answers to Cavell's question will remain incomplete and insufficient. To know what use it is to call Emerson a pragmatist requires us to look for Emerson's influence in Holmes's judicial writings that bear directly and practically on our society through the medium of legal cases.

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NOTES

1. The dichotomy can be expressed as the difference between a static and dynamic view. Consider this passage, which is not strictly about the common law but about two interpretative modes of legal analysis: "Static and dynamic modes have in common that the lawyer appeals to history for *authority*; to the authority of an original text or tradition or founding moment, or to the authority of the course of history itself, that is to the changing circumstances or long-run evolutionary trends that dictate the need for a new rule or new interpretation. The past is *read* as if it were a legal text with binding force, even if what is being cited is not exactly a text, but a body of intentions or a collection of practices. The premise is that if we decipher the signs correctly, we can read out of them principles and precedents that ought to control current interpretations. The past can control the present because it is continuously connected with the

present through narratives of stasis or tradition, or of progress and decline." (Gordon 1996: 125). Gordon goes on the state: "The *critical* modes by contrast are used to destroy, or anyway to question, the authority of the past. They assert discontinuous breaks between past and present. In ordinary legal arguments perhaps the most familiar of these critical modes is the argument from obsolescence or changed circumstances; the argument that the original reasons or purposes of a rule have ceased to exist, or that the rule sprang from motives or a context that are no longer acceptable to modern eyes, are rooted in ugly, barbaric, primitive conceptions or practices." (Gordon 1996: 125). Jeffrey G. Miller presents a similar dichotomy in "Evolutionary Statutory Interpretation," which "examines the seeming contrast between the legal doctrines that the interpretation of statutes can evolve over time and that the interpretation of statutes must be grounded only in their texts, which never change unless amended by Congress" (Miller 2009: 409). Bernadette Meyler has likewise explained that "Originalists' invocations of the common law posit a fixed, stable, and unified eighteenth-century content, largely encapsulated in William Blackstone's *Commentaries on the Laws of England*" (Meyler 2006: 553). On evolutionary common law within a constitutional context, see Jack M. Balkin's "The Roots of the Living Constitution," Balkin 2012.

2. Consider these examples from arbitrarily selected court decisions bearing the phrase *at common law*: "Jury trial at common law was not applicable to all common law actions, but was grudgingly conceded by the crown as to some and when our Constitution was adopted, was inapplicable to cases at common law where property was taken for public use" (*Welch v. TVA* 1939: 98). "The coroner is not bound at common law to put down the effect of the evidence, in writing, in any case" (*U.S. v. Faw* 1807: 1052). "To play at any game is no crime at common law, even to play for money; therefore there can be no offence unless it be attended with such circumstances as would themselves amount to a riot, or a nuisance, or to actual breach of the peace without the playing" (*U.S. v. Willis* 1808: 699). "In the case of libel in personam for the recovery of damages for personal injuries, the reason for following the limitations of the common law in courts of admiralty is emphasized by reason of there being preserved to the libelant in such a case the right to sue at common law, as well as in admiralty. In the event the libelant sued at common law, the statute of limitations would bar a recovery. It would be inconsistent to permit him to sue in admiralty, with the same effect as at common law (as is true in the case of a libel in personam), after his right to sue at common law had become barred." (*McGrath v. Panama R. Co.* 1924: 304). "In divining the generic, contemporary meaning, we look to a number of sources, including federal law, the Model Penal Code, treatises, and modern state codes. At common law, it was not necessary to allege or prove an act in furtherance of a conspiracy" (*U.S. v. Pascacio-Rodriguez* 2014: 4). I acknowledge that the phrase *at common law* has a long usage and that Sir Edward Coke himself employed it.

3. "One of the most important contemporary constitutional debates is whether the meaning of the Constitution may evolve in light of current circumstances, or whether the Constitution should be interpreted in accordance with how the text was originally understood by the public that ratified it" (Schor 2010-1: 961). Gordon states: "The Constitution and the common law had a core of 'principle,' of fundamental unchanging meanings. But principles had to be adapted to changing circumstances, and above all, to the modernizing dynamic of historical evolution. The static and dynamic modes were ultimately reconciled through eleology: the assertion that basic legal principles were 'working themselves pure,' were gradually evolving from primitive, obscure or cluttered forms to the highest and best realization of themselves. The 'Classical' liberals who dominated legal thought at the end of the 19th century needed a dynamic view of history because they knew perfectly well that the economic and political liberalism they espoused had not existed in any pure form at the Nation's founding." (Gordon 1996: 128). Gordon believes Originalists upend the traditional approach to constitutional interpretation in the United States: "In their insistence that the 'rule of law is a law of rules,' the originalist-traditionalist jurists are,

ironically, swimming against the main current of *traditional* American historical jurisprudence, that is common-law dynamic adaptationism, given content and direction by liberal modernization theory" (Gordon 1996: 132). David Strauss agrees, stating, "[T]extualism and originalism remain inadequate models for understanding American constitutional law. They owe their preeminence not to their plausibility but to the lack of a coherently formulated competitor. The fear is that the alternative to some form of textualism or originalism is 'anything goes'." (Strauss 1996: 879).

4. According to Strauss, "The common law method has not gained currency as a theoretical approach to constitutional interpretation because it is not an approach we usually associate with a written constitution, or indeed with codified law of any kind. But our written constitution has, by now, become part of an evolutionary common law system, and the common law – rather than any model based on the interpretation of codified law – provides the best way to understand the practices of American constitutional law." (Strauss 1996: 885). He adds that "[c]onstitutional law in the United States today represents a flowering of the common law tradition and an implicit rejection of any command theory" (Strauss 1996: 887).

5. Theodore Plucknett states, "When English common law was being adopted in America there was sometimes a question as to how far certain statutes were to be regarded as inseparable from the customary common law" (Plucknett 2010: 309). "In Blackstone," says William D. Bader, "early American lawyers encountered a legal authority who regarded precedent as the cornerstone of the common law, the principal bulwark against the usurpation of the rule of law by judicial tyranny" (Bader 1994-5: 8). See also *Van Ness v. Pacard*. (1829) 27 U.S. (2 Pet) 137, 144: "The common law of England is not taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation."

6. David Konig states: "Identification of the role of the common law in providing a constitutional foundation does not suggest an intent to adopt a federal common law. Rather, the 'common-law mind' was a way of thinking, of using judicial authority to express abstract principles through the application of particular privileges and rights, such as trial by jury. It rested on consent created by long adherence to custom and precedent, and it was controlled by practice rather than abstraction." (Konig 2010: 510-1). He adds that "[c]ommon-law constitutionalism [...] provided both legitimacy and method. It meant a deference to the tacit consent that came only from long adherence to precedent and the refinement and perfection of law by common-law reasoning and decision making." (Konig 2010: 511).

7. "Holmes considered himself a Darwinist and concentrated his scholarly energies on the question of how law evolves. When Holmes was attending the meetings of the Metaphysical Club during the early 1870s, Chauncey Wright, the group's leader who Holmes treated as a mentor, was in the midst of an extended, mutually supportive correspondence with Darwin." (Blasi 2004: 25).

8. E.g., Palmer (1945: 569-73); Palmer (1946: 328-32); Palmer (1951: 809-11).

9. E.g., Howe (1951: 529-46); Hart (1951: 929-37); Howe (1950-1: 937-39).

10. E.g., Alschuler (1997: 353-420); Fisher (2001: 455-92); Brown & Kimball (2001: 278-321); Friedman (2001: 1383-1455); Bernstein (2003: 1-64); Strasser (2003: 1379-1408).

11. In *A Grammar of Motives,* Burke states, "we can see the incipient pragmatism in Emerson's idealism" (Burke 1952: 277); moreover, he says, "Emerson's brand of transcendentalism was but a short step ahead of an out-and-out pragmatism" (Burke 1952: 277).

12. My earlier work made this very mistake: Mendenhall (2011: 679-726); Mendenhall (2012: 517-50). I am, however, in good company: see, e.g., Weisberg (1996: 85-96); Pearcey (2000-1: 483-511); Matsuda (1990: 1763-82); Minow and Spelman (1990: 1597-1652); Radin (1990: 1699-1726); and Schanck (1992: 2505-97).

13. "In recent decades philosophical pragmatism has been vulgarized and abused; and of late it has sometimes found itself co-opted in support of this or that neo-analytic fashion. Something not dissimilar has also happened in legal thinking: occasionally you read that legal pragmatism is enjoying a 'renaissance,' but as you look closer you soon begin to wonder what, exactly, this is a renaissance *of*; for the sad fact is that, in legal as in mainstream philosophy, vulgarization and co-option seem to be the order of the day." (Haack 2008: 455).

14. "He is one of the few jurists in American history whose career was long enough, and whose impact pervasive enough, to have functioned as a kind of repository of changing juristic attitudes. Holmes's role as a repository has in part been a function of the seminality of his thought and the memorable quality of his style, but it has also been a function of the deeply ambivalent character of his jurisprudence and the cryptic nature of his expressions." (White 1986: 440).

15. "It was in thinly settled colonial America that the Commentaries received most acclaim. By 1776 nearly twenty-five hundred copies were in use here, one thousand five hundred of which were the American edition of 1772; a sale which Burke in 1775 in his speech on 'Conciliation with the American Colonies' said rivaled that in England." (Waterman 1932-3: 629-59). "It is part of the accepted wisdom of American history that Sir William Blackstone and his *Commentaries on the Laws of England (Commentaries)* have exercised a dominant and pervasive influence on America's political thought and legal development" (Nolan 1976: 731-68). "Before the Revolution one thousand English sets [of Blackstone's *Commentaries*] at ten pounds a set were sold in American and many more American editions sold at the bargain price of three pounds a set. In fact, before the war broke out almost as many sets were sold in the American colonies as in England. The work had an enormous effect in America not because of the 'social consistency' of Blackstone's thinking, but because it was the only general treatise available in a land where well-trained lawyers were almost non-existent." (McKnight 1959: 401). Moreover, "during the period from 1789 to 1915, the authority of the *Commentaries* was cited ten thousand times in reported American cases" (McKnight 1959: 401). Americans' reverence toward Blackstone was not reciprocated: "While in Parliament from 1761 to 1770, he went along with all those restrictive measures which first enraged and then estranged the American colonists. Actually, he was very extreme in his anti-American bias, and he appeared among the most vociferous advocates of a harsh and uncompromising attitude towards America. It might be said that he definitely delighted in showing the colonists the rod." (Chroust 1949: 28-9).

16. Coke stated (2003: 275), "And it appeareth in our Books, that in many Cases, the Common Law doth controll Acts of Parliament, and somtimes shall adjudge them to be void: for when an Act of Parliament is against Common right and reason, or repugnant, or impossible to be performed, the Common Law will controll it, and adjudge such Act to be void." Cf. Hale's statement (1713: 45): "I come now to that other Branch of our Laws, the common Municipal law of this Kingdom, which has the Superintendency of all those other particular Laws used in the before-mentioned Courts, and is the common Rule for the Administration of common Justice in this great Kingdom; of which it has been always tender, and there is great Reason for it; for it is not only a very just and excellent Law in itself, but it is singularly accommodated to the Frame of the English Government, and to the Disposition of the English Nation, and such as by a long Experience and Use is at it were incorporated into their very Temperament, and, in a manner, become this Complexion and Constitution of the English Commonwealth."

17. To say that Blackstone was categorically opposed to legislation is hyperbolic. The mistake is understandable given Blackstone's celebration of the common law. However, Blackstone notoriously declared that, "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms [...] that is vested to with authority to control it" (Blackstone 1966: 91). Blackstone would seem to suggest here that a statute could be valid even if it does not correspond with divine or natural law, a position that contradicts his

willingness to overturn any prior cases that do not comport with reason or divine law: "For it is established rule to abide by former precedents, where the same points come again in litigation; [...] [y]et this rule admits of exception, where the former determination is most evidently contrary to reason, much more if it be contrary to the divine law" (Blackstone 1966: 69-70). Michael Lobban explains that "Blackstone seems to have adopted [his] notion of parliamentary without fully realizing its difficulties for his natural-law arguments and his belief in the primacy of the common law" (Lobban 1987: 326).

18. Jeremy Bentham famously attacked Blackstone's jurisprudence from a utilitarian, positivist perspective; at sixteen, Bentham allegedly attended Blackstone's lectures. John Austin would go on to become Bentham's positivist *protégé*. For more on this topic, see Mendenhall (2010: 319-34) (discussing the relationship between the natural law theories of Jefferson and Blackstone in contrast to the utilitarian, positivist theories of Bentham and Austin). For critiques of Blackstone's jurisprudence regarding the validation of British law and state power, see the following: McKnight, who states, "The aim of English law, then, as Blackstone saw it, was to *return* the Englishman to the ideal primitive state long since departed from" (McKnight 1959: 404); Chroust (1949: 24-34) (discussing Blackstone's "abject flattery of the British crown" and his genuflections regarding the King's "absolute perfection" and accusing Blackstone of creating "pure fiction" and "calculating flattery" rather than scholarship).

19. "Blackstone's popularity can be attributed to his smooth transformation of the crabbed particularities of the English law into the abstract and universal language demanded by the intellectual fashions of the Enlightenment. His theoretical bow to the ultimate supremacy of the natural law was dictated by the same fashions – fashions which, in England, reflected the continuing prestige of the great figure of Locke." (Grey 1978: 859-60).

20. "There is no question that Holmes was influenced by, and sought a relationship to, the work of Sir Henry Maine. Scholars have yet to explore thoroughly the relationship between Maine and Holmes. Holmes met Maine in the 1880s. As a law student, Holmes read *Ancient Law* more than once. In 1875, Henry Adams described Holmes as 'one of Maine's warmest admirers.' Scholars have even claimed, unfortunately without adequate citation, that, in *The Common Law,* Holmes wanted to do for common-law materials what Main had done for Roman law materials in *Ancient Law*." (Parker 2003: 68-9).

21. "[A] legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way by judgment of the court; – and so of a legal right" (Holmes 1897: 458). Here Holmes calls the law a "body of dogma or systemized prediction" (Holmes 1897: 458).

22. "The law talks about rights, and duties, and malice, and intent, and negligence, and so forth, and nothing is easier, or, I may say, more common in legal reasoning, than to take these words in their moral sense, at some stage of the argument, and so to drop into fallacy. For instance, when we speak of the rights of man in a moral sense, we mean to mark the limits of interference with individual freedom which we think are prescribed by conscience, or by our ideal, however reached. Yet it is certain that many laws have been enforced in the past, and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limit of interference as many consciences would draw it. Manifestly, therefore, nothing but confusion of thought can result from assuming that the rights of man in a moral sense are equally rights in the sense of the Constitution and the law. No doubt simple and extreme cases can be put of imaginable laws which the statute making power would not dare to enact, even in the absence of written constitutional prohibitions, because the community would rise in rebellion and fight; and this gives some plausibility to the proposition that the law, if not a part of morality, is limited by it. But this limit of power is not coextensive with any system of morals. For the most part it falls far within the lines of any such system, and in some cases may extend beyond them, for reasons drawn from the habits of a particular people at a particular

time. I once heard the late Professor Agassiz say that a German population would rise if you added two cents to the price of a glass of beer. A statute in such a case would be empty words, not because it was wrong, but because it could not be enforced. No one will deny that wrong statutes can be and are enforced, and we should not all agree as to which were the wrong ones." (Holmes 1897: 460).

23. "[N]owadays no one doubts that a man may be liable, without any malevolent motive at all, for false statements manifestly calculated to inflict temporal damage. In stating the case in pleading, we still should call the defendant's conduct malicious; but, in my opinion at least, the word means nothing about motives, or even about the defendant's attitude toward the future, but only signifies that the tendency of his conduct under the known circumstances was very plainly to cause the plaintiff temporal harm." (Holmes 1897: 463).

24. "[T]he North [...] was anxious to leave transcendentalism behind. The generational shift from transcendentalism to pragmatism is well known. [...] A classic example is Oliver Wendell Holmes Jr., the son of Emerson's good friend Oliver Wendell Holmes Sr. The younger Holmes left for a war he called 'a crusade in the cause of the whole civilized world,' but returned to announce, 'I do not know what is true.' Higher law lost its allure among the young men who fought a bloody war on its behalf." (Levine & Malachuk 2011: 15-6).

ABSTRACTS

This essay builds on recent work by Susan Haack to suggest that Oliver Wendell Holmes Jr.'s conception of the common law was influenced by Darwinian evolution and classical pragmatism. This is no small claim: perceptions of what the common law is and does within the constitutional framework of the United States continue to be heavily debated. Holmes's paradigm for the common law both revised and extended the models set forth by Sir Edward Coke, Thomas Hobbes, Sir Matthew Hale, and Sir William Blackstone. Adding additional substance to Haack's argument by pointing out passages in Holmes's opinions and in his only book, *The Common Law,* that corroborate her claims about the particular features of Holmes's pragmatism, this essay concludes by suggesting that, because of his connections with the classical pragmatists and his reverence for Emerson, Holmes is the best place to begin answering the famous question formulated by Stanley Cavell: "What's the Use in Calling Emerson a Pragmatist?"

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